

AUGUST B. LANDIS, Assistant United States Trustee  
State Bar # IA PK9228

E-Filed on July 21, 2006

[augie.landis@usdoj.gov](mailto:augie.landis@usdoj.gov)

**UNITED STATES DEPARTMENT OF JUSTICE**

Office of the United States Trustee  
300 Las Vegas Boulevard, So., Suite 4300  
Las Vegas, Nevada 89101  
Telephone: (702) 388-6600 Ext. 235  
Facsimile: (702) 388-6658

Attorneys for the Acting United States Trustee  
SARA L. KISTLER

**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF NEVADA**

In re:

**USA Commercial Mortgage Company**  
**06-10725 -- Lead Case**

**USA Capital Realty Advisors, LLC**  
06-10726

**USA Capital Diversified Trust Deed Fund, LLC**  
06-10727

**USA Capital First Trust Deed Fund, LLC**  
06-10728

**USA Securities, LLC**  
06-10729

Debtors

**Jointly Administered**

Chapter 11 Cases

Judge **Linda B. Rieggle** Presiding

Date: **July 25, 2006**

Time: **9:30 a.m.**

**Affecting:**

☒ All Cases

**or Only:**

☐ USA Commercial Mortgage Company

☐ USA Capital Realty Advisors, LLC

☐ USA Capital Diversified Trust Deed Fund,  
LLC

☐ USA Capital First Trust Deed Fund, LLC

**THE UNITED STATES TRUSTEE'S SUPPLEMENTAL OPPOSITION TO**  
**APPLICATIONS TO EMPLOY AND RETAIN RAY QUINNEY & NEBEKER,**  
**P.C. AS COUNSEL FOR THE DEBTORS**

To the Honorable **LINDA B. RIEGLE**, United States Bankruptcy Judge:

The United States Trustee has previously opposed, and continues to oppose, the Applications to Employ and Retain Ray Quinney & Nebeker, P.C. as Counsel for the Debtors in each of the five separate Chapter 11 cases identified in the caption. *See* Docket #221.

Supplementation of the United States Trustee's opposition as originally filed is necessary to address subsequent events which substantiate the United States Trustee's opposition. This

1 supplement is supported by the United States Trustee's opposition as originally filed and  
 2 incorporated herein by this reference, the pleadings and papers comprising the official court file  
 3 in this case, and the following Memorandum of Points and Authorities.

#### 4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 1. Through the applications, Ray Quinney & Nebeker, P.C. seeks approval to serve as  
 6 counsel for the debtor entity in each of the five different cases pending before the Court.

#### 7 **CONTROLLING STATUTES AND POLICY CONSIDERATIONS**

8 2. The applications, requesting authorization for Ray Quinney & Nebeker, P.C. to serve  
 9 as counsel for the debtor entity in each of the five different cases at issue, are premised upon 11  
 10 U.S.C. § 327(a).

11 3. The text of 11 U.S.C. § 327(a) provides generally that the trustee may employ one or  
 12 more attorneys that do not hold or represent an interest adverse to the estate, and are  
 13 disinterested persons, to represent or assist the trustee in carrying out the trustee's duties in  
 14 connection with a bankruptcy case.

15 4. The disclosures required of a professional seeking employment under 11 U.S.C.  
 16 § 327(a) are set forth in Fed. R. Bankr. P. 2014(a).

17 5. In addition to the provisions of 11 U.S.C. § 327(a), the issues here turn on the  
 18 provisions of 11 U.S.C. § 327(c). Section 327(c) generally provides that while an attorney is  
 19 not disqualified from employment on behalf of the trustee solely because he or she represents a  
 20 creditor, upon objection by the United States Trustee "the court shall disapprove such  
 21 employment if there is an actual conflict of interest."

22 6. The policy objectives of 11 U.S.C. § 327 include holding professionals performing  
 23 duties for the estate to strict fiduciary standards, and to assure that a professional employed in a  
 24 bankruptcy case will devote undivided loyalty to the client. In re Wheatfield Bus. Park, LLC,  
 25 286 B.R. 412, 417-18 (Bankr. C.D. Cal. 2002), *citing* In re Envirodyne Indus., Inc., 150 B.R.  
 26 1008, 1016 (Bankr. N.D. Ill. 1993) *and* In re Lee, 94 B.R. 172, 178 (Bankr. C.D. Cal. 1988).  
 27 "Having to divide one's allegiance between two clients is what Section 327 attempts to prevent."  
 28

1 In re Mercury, 280 B.R. 35, 54 (Bankr. S.D.N.Y. 2002), *quoting* In re Roger J. Au & Son, Inc.,  
 2 101 B.R. 502, 505 (Bankr. N.D. Ohio 1989).

### 3 AUTHORITY AND ARGUMENT

4 **SINCE PROPOSED COUNSEL HAS NOW ACKNOWLEDGED THAT AN**  
 5 **ACTUAL CONFLICT OF INTEREST EXISTS BETWEEN THE DEBTORS, THE**  
 6 **APPLICATIONS SHOULD BE DENIED.**

7 7. Subsequent to the May 12, 2006 filing of the United States Trustee's original  
 8 opposition to the applications, on July 18, 2006, Debtor USA Commercial Mortgage Company  
 9 filed an "Application by Debtor and Debtor-in-Possession for Authorization to Retain and  
 10 Employ David W. Huston *as Special Conflicts Counsel* Under General Retainer." *See* Docket  
 # 883 (emphasis added).

11 8. That motion expressly acknowledges that because one set of attorneys has been  
 12 representing all five of the debtors in these five separate Chapter 11 cases, it has now become  
 13 necessary to hire another attorney in these proceedings to address "matters where USACM's  
 14 bankruptcy counsel, Ray Quinney & Nebeker and Schwartz & McPherson Law Firm have a  
 15 conflict of interest or an appearance of a conflict of interest" in connection with an interpleader  
 16 action "in which USACM will be the plaintiff and USA Capital First Trust Deed Fund (the  
 17 "FTDFund") will be a defendant." The interpleader action is needed "to determine the  
 18 ownership of the funds in USACM's Investor Trust Account which contains approximately which  
 19 contains approximately \$1.7 million and against which there are approximately \$3.4 million in  
 20 claims by persons who either sold or purchased fractional interests in direct loan investments",  
 21 including a \$100,000.00 claim held by debtor USA Capital First Trust Deed Fund. *See* Special  
 22 Counsel Motion, Docket # 883, at para. 2.

23 9. The special counsel application also expressly acknowledges that "Bankruptcy  
 24 counsel for USACM believes that it would appear to be inappropriate for counsel, who also  
 25 represents FTDFund in these proceedings, to represent either USACM or FTDFund in this  
 26 litigation." *Id.* The United States Trustee agrees, and contends that the same logic applies with  
 27 respect to representation of all of the debtors by a single set of attorneys.  
 28

1           10. In addition, debtor USACM has sought to obtain debtor in possession financing on  
2 two separate occasions under terms that offered a lien to the proposed lender not only on the  
3 assets of debtor USACM, but also a "priming lien" on the unencumbered assets held by two  
4 other debtors, USA Capital First Trust Deed Fund and USA Capital Diversified Trust Deed  
5 Fund. *See* Docket # 171, 254 and 588.

6           11. An "actual" conflict of interest in the context of 11 U.S.C. § 327 is "an active  
7 competition between two interests, in which one interest can only be served at the expense of the  
8 other." In re Mercury, 280 B.R. 35, 54 (Bankr. S.D.N.Y. 2002)(citations omitted).

9           12. "Section 327(a) prohibits an attorney (or other professional) from representing a  
10 debtor in a chapter 11 case if the attorney has or represents an actual conflicting interest. This  
11 prohibition is absolute, and is not subject to waiver or consent." In re Wheatfield Bus. Park,  
12 LLC, 286 B.R. 412, 420-21 (Bankr. C.D. Cal. 2002)(citations omitted); *see also* In re Interwest  
13 Bus. Equip., Inc., 23 F. 3d 311, 315-16 (10th Cir. 1994)(Where a "creditor or the U.S. Trustee  
14 objects, the bankruptcy judge can disqualify a professional *solely* on the basis of simultaneous  
15 representation, *if* it finds the joint representation creates an actual conflict.")(emphasis in  
16 original); *see generally* 11 U.S.C. § 327(c)(where objection to retention of a professional is made  
17 by the United States Trustee, "the court shall disapprove such employment if there is an actual  
18 conflict of interest.").

19           13. The filing of multiple motions seeking to obtain the benefit of debtor in possession  
20 financing for one debtor (USACM), at the expense of two other debtors (the Funds) and the  
21 unencumbered assets held in their estates, confirms the presence of an existing and "actual"  
22 conflict of interest in the context of 11 U.S.C. § 327. Such conduct clearly demonstrates the  
23 presence of "an active competition between two interests, in which one interest can only be  
24 served at the expense of the other." In re Mercury, 280 B.R. at 54.

25           14. The standard under 11 U.S.C. § 327 is very high: "If there is any doubt as to the  
26 existence of a conflict, that doubt should be resolved in favor of disqualification." Wheatfield,  
27 286 B.R. at 418, *citing* Lee, 94 B.R. at 177.

1 15. Because an actual conflict exists between the interests of USA Commercial  
2 Mortgage Company on one hand, and USA Capital Diversified Trust Deed Fund and USA  
3 Capital First Trust Deed Fund on the other, the retention proposed in the applications violates the  
4 provisions of 11 U.S.C. § 327, and must therefore be denied. *See Wheatfield*, 286 B.R. at 421  
5 ("[A]n actual conflict of interest creates a violation of § 327.").

6 **CONCLUSION**

7 The United States Trustee therefore respectfully requests that the Court enter an order  
8 denying the applications, and granting such other and additional relief as is just and equitable.

9 Respectfully submitted,

10 **SARA L. KISTLER**  
11 **ACTING UNITED STATES TRUSTEE**  
12 **REGION 17**

13 By: /s/ August B. Landis  
14 August B. Landis, Assistant United States Trustee  
15 United States Department of Justice  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28